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Supreme Court, U.S.
FILED

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

TRANSPAC DRILLING VENTURE, 1983-63 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-1 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE,1983-2 BY JAMES M. DOBBINS, AND TRANSPAC DRILLING VENTURE,1983-4 BY BRYAN D. BURR,
PETITIONERS,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Arthur H. Boelter
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APPENDIX

Lower Courts' Judgments:

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-5045

TRANSPAC DRILLING VENTURE, 1983-63 by CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-1 by CRESTWOOD HOSPITALS, INC.,TRANSPAC DRILLING VENTURE, 1983-2 by JAMES M. DOBBINS, TRANSPAC DRILLING VENTURE, 1983-4 by BRYAN D. BURR,

Plaintiffs-Appellants,

and

TRANSPAC DRILLING VENTURE, 1983-14, by ALISTER CORPORATION,TRANSPAC DRILLING VENTURE, 1983-38 by LINDSEY & HALL, INC.

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

Arthur H. Boelter, Boelter & Gale, of Seattle, Washington, argued for plaintiffs-appellants. With him on the brief was John J. White, Jr. and Shawn M. Soderberg.

Sarah K Knutson, Attorney, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were Michael L. Paup, Acting Assistant Attorney General, Gary R. Allen and Teresa E. McLaughlin, Attorneys.

Appealed from: U.S. Court of Federal Claims Judge Margolis

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-5045

TRANSPAC DRILLING VENTURE, 1983-63 by CRESTWOOD HOSPITALS, INC.,TRANSPAC DRILLING VENTURE, 1983-1 by CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-2 by JAMES M.DOBBINS,TRANSPAC DRILLING VENTURE, 1983-4 by BRYAN D. BURR,

Plaintiffs-Appellants,

and

TRANSPAC DRILLING VENTURE, 1983-14, by ALISTER CORPORATION,TRANSPAC DRILLING VENTURE, 1983-38 by LINDSEY & HALL, INC.,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: February 8, 1994

Before NIES, Chief Judge, BENNETT, Senior Circuit Judge, and RADER Circuit Judge.

NIES, Chief Judge.

In the Internal Revenue Code of 1986

(26 U.S.C. et seq.), section 6226(b)(3) permits the "tax matters partner" of a limited partnership to file a petition on behalf of the partnership to contest adjustments to partnership income made by the Internal Revenue Service. The appeal in this case, which comes to us from the United States Court of Federal Claims (Margolis, J.), concerns this provision of the code. The trial court dismissed the subject petitions concerning tax years 1983 and 1984, on the ground that none of the parties filing for the partnerships, Crestwood Hospital, Inc., James M. Dobbins, or Bryan D. Burr, was a "tax matters partner" (TMP) authorized to do so under the statute. We agree and, accordingly, affirm the judgments.

I.

BACKGROUND

Transpac Drilling Venture 1983-63, 1983-1, 1983-2, and 1983-4 (hereinafter TDV 1983-63, TDV 1983-1, TDV 1983-2 and TDV 1983-4) is each a limited partnership organized under the laws of Delaware. Crestwood Hospital, Inc., Bryan Burr, and James M. Dobbins were limited partners in one or more of these partnerships during the tax years 1983 and 1984.

Douglas C. Adams was one of two general partners for each of the limited partnerships during the tax years at issue. Adams was designated the TMP in the partnership agreements for the partnerships, dealt with the IRS as TMP, and held himself out to be TMP of the respective partnerships until January 30, 1990. The other general partner, Churchill Oil & Gas Corporation,

forfeited its corporate charter in September 1984.

During 1986 or 1987, the Government began investigating Adams in connection with possible criminal violations for his activities with respect to the development, promotion and sale of tax shelter investment programs, including the various Transpac Drilling Ventures. On September 4, 1987, Adams entered into a plea agreement with the Offices of the United States Attorneys for the Southern District of New York and the District of New Jersey, pursuant to which Adams agreed, inter alia, to plead guilty to charges of conspiracy and aiding and abetting fraud by an investment counselor and to file amended personal federal income tax returns for the tax years at issue. The IRS was not a party to the plea agreement and remained free to pursue any lawful civil remedies it

deemed appropriate against Adams.

The IRS conducted partnership level examinations of the TDV partnerships' tax returns filed for the taxable years 1983 and 1984 during 1988 and 1989 treating Adams as the TMP. At the conclusion of the examinations, the IRS issued notices of Final Partnership Administrative Adjustments (FPAAs) and mailed them to Adams, as TMP, on November 7 (TDV 1983-63), 9 (TDV 1983-1 and 1983-2), and November 17 (TDV 1983-4), 1989. Copies of the FPAA were also sent to the limited partners, including Crestwood, Burr and Dobbins, who are termed "notice" partners.[1]

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[1] Section 6231 of Title 26 of the United States Code defines a notice partner as a partner who is entitled to notice under 26 U.S.C. § 6223(a). Section 6223(a) provides that the Secretary must give notice of the beginning and completion of administrative proceedings under TEFRA to partners who have furnished their names and addresses to the Secretary at least 30 days before the notice is mailed to the tax matters partner.

Under the statutory framework, either the "tax matters partner" or any "notice partner" may challenge the FPAA in proceedings brought in the Tax Court, the appropriate United States District Court, or the Court of Federal Claims. Only one such petition for readjustment may go forward. See I.R.C. § 6226(b). If the TMP files a petition for readjustment in the Tax Court, the Court of Federal Claims or the appropriate federal district court, within 90 days of issuance of the statutory notice, any other action is precluded. I.R.C. § 6226 (a), (b) (1). If the 90-day period expires without the filing of such a petition by the TMP, then any notice partner may file a readjustment petition within the next 60 days in any of the

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Subsection (b) indicates that subsection (a) does not apply to a partner if the partnership has more than 100 partners and the partner has less than a 1 percent interest.

courts in which the TMP could have filed. If more than one notice partner files a readjustment petition, then the first petition filed in the Tax Court (if any) goes forward, and all other petitions are dismissed. I.R.C. § 6226 (b)(2). If no petition is filed in the Tax Court, then the first petition filed in a district court of in the Court of Federal Claims goes forward, and all other petitions are dismissed. I.R.C. §§ 6226 (b)(3), (4).

The statute effectively permits the TMP to select the forum for the litigation by filing a timely petition. The selection of the forum may be considered by a TMP as an important advantage since significant differences exist between the various fora. Additionally, it must be noted that the aforementioned requirements for filing a petition are jurisdictional in nature because a petition filed within 90 days

by a partner who is not a TMP does not effectively commence suit. See Computer Programs Lambda, Ltd. v. Commissioner, 89 T.C. 198, 202 (1987).

I.R.C. § 6231 (a) (7) (A) permits a partnership to designate its TMP "as provided in regulations," so long as the person or entity chosen is a general partner in the partnership. If the partnership should fail to designate a TMP, then "the general partner having the largest profits interest in the partnership at the close of the taxable year involved" becomes the TMP. I.R.C. § 6231 (a)(7)(B). However, by regulation certain general partners are excluded from serving as TMP, e.g., one who is under investigation for criminal tax evasion. The I.R.C. further provides that the Secretary of the Treasury may designate a TMP for a partnership if no general partner has been designated as

such, and it would be "impracticable to apply subparagraph (B)." I.R.C. § 6231 (a)(7).

Adams, who received notice while TMP, filed no petitions. It is accepted for purposes of decision here that he orally resigned as TMP on January 30, 1990, and orally named a limited partner to act as TMP at that time. On February 9, 1990, a petition in the Court of Federal Claims for each partnership was filed by the named limited partner claiming to be the successor TMP.[2] On February 12, 1990, after these petitions for readjustment were filed, Adams executed a document "Resignation of Tax Matters Partner and Appointment of New Tax Matters Partner," for each of the partnerships in question. In each document, Adams stated that he

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[2] The trial court found each petition was timely filed, i.e., within 90 days of the issuance of the FPAA, despite the November 7, 1989, issue date of one of the FPAAs.

was resigning as TMP, and that he was appointing taxpayers Crestwood, Dobbins and Burr as general partners of the respective partnerships for the tax years 1983 and 1984 "for the limited purpose of serving as TMP." Taxpayers each executed acceptances of their respective appointments on April 9, 1990. In March 1990, appellants also submitted consents by a majority in interest of the limited partners for the filing partner to serve as TMP in two of the partnerships.

The IRS administrative files do not contain any record of the resignation of Adams as any partnership's TMP or the designation of a successor. The first notice the IRS received was by the petitions filed in the Court of Federal Claims in February 1990, which state that on or about January 30, 1990 the original TMP, Adams, "resigned as TMP and agreed to the appointment of [the limited

partner who filed] as TMP and as a general partner for the limited purpose of serving as TMP."[3]

The Government moved to dismiss each of the subject petitions for lack of jurisdiction on the ground that the petitions were filed during the 90-day period reserved exclusively for filing by a TMP and none of the petitioners who filed had that status. The trial court agreed. In addition, the court rejected appellant's various arguments for retroactive ratification of the petitions.

After the 90-day period during which only a TMP may file suit, other limited partners in three of the four partnerships filed timely petitions in

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[3] The petition filed by Dobbins inconsistently states in one place that Dobbins was appointed as successor TMP and in another that the substituted TMP is Crestwood. We will deem this an editing error.

the U.S. Tax Court. Other protective petitions were filed in the Court of Federal Claims. The dispute is essentially over which forum will adjudicate the matters. If the petitions filed in the Court of Federal Claims within the 90-day period were effective, those suits preempt any in the Tax Court and vice versa.

II.

STANDARD OF REVIEW

Whether the Court of Federal Claims properly granted the government's motion to dismiss for lack of jurisdiction is a question of law subject to de novo review on appeal. Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991).

III.

ANALYSIS

A. Tax Equity and Fiscal Responsibility Act

A partnership is required to file an annual information tax return even though it is not a taxable entity for federal income tax purposes. I.R.C. §§ 701, 6031; 26 C.F.R. § 1.701-1. Each partner is liable for income tax in his or her individual capacity with respect to his or her share of partnership items of income, loss, deduction and credit. I.R.C. § 702; 26 C.F.R. § 1.701-1. Prior to 1982, adjustments to the tax treatment of partnership items had to be determined in separate proceedings involving each individual partner, resulting in duplication of administrative and judicial effort, inconsistent results and difficulty in reaching comprehensive

settlements. See Maxwell v. Commissioner, 87 T.C. 783, 787 (1986).

To simplify the procedures for determining the tax liability of individual partners in a partnership, Congress enacted the Tax Treatment of Partnership Items Act of 1982 as Title IV of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No 97-248, 96 Stat. 324. I.R.C. § 6231 (a)(1). The provisions, set forth in Subchapter C of Chapter 63 of the Internal Revenue Code at §§ 6221-6233, establish procedures for determining tax treatment of partnership items on audit and for obtaining judicial review of those determinations. See Maxwell v. Commissioner, 87 T.C. at 787-88.

Under TEFRA, the IRS is required to give partners notice when it begins an administrative proceeding relating to a partnership item. I.R.C. § 6223(a)(1).

TEFRA applies to all partnerships required to file a return under section 6031(a)(4).[4] If the administrative proceeding results in any adjustments to partnership items, the IRS is required to mail a notice of a FPAA reflecting its determinations to the TMP for the partnership in question. I.R.C. § 6223(a),(d). Section 6231(a)(7) defines a TMP as follows:

> (7) Tax matters partner. The tax matters partner of any partnership is--
>
> (A) the general partner designated as the tax matters partner as provided in regulations, or
>
> (B) if there is no general

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[4] Section 6031 provides: "Every partnership (as defined in section 761(a)) shall make a return for each taxable year . . . ." 26 U.S.C. § 6031(a). Section 761(a) defines partnership as "a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a corporation or a trust or estate." 26 U.S.C. § 761(a).

> partner who has been so designated, the general partner having the largest profits interest in the partnership in the taxable year involved (or, where there is more than 1 such partner, the 1 of such partners whose name would appear first in an alphabetical listing).
>
> If there is no general partner designated under subparagraph (A) and the Secretary determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the tax matters partner.

B. Petitions as Filed Were Defective

The appellants here were not TMPs of the partnerships at the time of filing or at any time within the 90-day period reserved for filing by a TMP. First, each was ineligible to be designated as TMPs under subsections (A) or (B) of § 6231(a)(7) because none was a general partner of the partnership on whose behalf the petition was filed. As the

Court of Federal Claims noted, general partners assume unlimited liability for partnership debts under Delaware limited partnership law.[5] Dobbins, Burr, and Crestwood did not. They, at most, agreed to be general partners for the limited purpose only of serving as the TMP. Not having taken on general liability, they do not qualify as general partners and cannot be designated by the partners as TMPs under either paragraph A or B of the statute or under the Temporary Regulations implementing that provision. Temp. Treas. Reg. § 301.6231(a)(7)-IT(b)(1)(1987). To hold that the requirement of the statute that the TMP must be a general partner could be so easily circumvented would effectively

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[5] General partners of limited partnerships have "the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners." Del. Code Ann. tit. 6, § 17-403 (1974 & Supp. 1988).

vitiate the statutory requirement.

Appellants argue, however, that there are circumstances where a limited partner may become a TMP. The IRS expressly has stated that it has the authority to appoint a limited partner as a TMP. Rev. Proc. 88-16, 1988-1 C.B. 691. Here, however, the IRS did not appoint the petitioners as TMPs. Indeed, the Secretary had not selected anyone to be "treated as the tax matters partner" as authorized in section 6231(a)(7) and was not even aware that Adams had resigned until after the subject petitions were filed.

Appellants next argue that section 6231(a)(7) and the Temporary Regulations do not control once the FPAA has been issued to a partnership. According to appellants, the TEFRA proceedings have two distinct stages: an administrative stage and a judicial stage, and the

rights and responsibilities of the TMP differ in the two stages. Per appellants, the purpose of section 6231(a)(7) is only to set forth the criteria for the selection of a TMP when the partnership is before the Service. The TMP serves as a liaison between the Service and the partnership. If restricted to section 6231(a)(7), appellants argue, it could be impossible for some partnership to appoint a TMP and the Service has no incentive to do so. Thus, after issuance of the FPAA, appellants urge that the partnership should be able to designate a TMP of its own choosing from among any of the limited partners. We disagree.

Nothing in the statute restricts section 6231(a)(7) to pre-litigation. The TMP of a partnership is a continuing status until changed in accordance with the statute and regulations. Here

nothing in the statute or regulations permitted the general partner, Adams, to appoint a new TMP of a partnership. Further, we have been pointed to no evidence in the record that Adams had authority to select or even propose a TMP candidate under the partnership agreement.

Finally, appellants argue that the statute requires the partnership to have a TMP for judicial proceedings. We disagree. The statute clearly contemplates suits by non-TMPs. While the TMP may act to preempt the rights of others to sue, the absence of a TMP is no different from the failure of a TMP to take timely action or to take no action at all.

For the foregoing reasons, we conclude that the petitions were not filed by an entity who was a TMP at the time.

C. Post-Filing Validation

Appellants urge that steps have been taken and others could be taken to validate the petitions as of their filing date.

Appellants first suggest that the court should sua sponte appoint the filing partners as TMPs. They point out that a large percentage of partners voted, after the petitions were filed, in favor appellants as their TMP.

Jurisdiction over a TMP complaint must have been acquired as of the date when the petition was filed or at least before expiration of the 90 day period in which a TMP may file and preempt other suits. No alleged validating action was taken within that time. We question whether retroactive validation of a wholly defective complaint for the purpose of giving a court jurisdiction is ever appropriate. In this case, clearly it is

not. Such action would be contrary to the statutory scheme in issue. Under the statute, the untimeliness or failure of actions by a TMP gives rise to entitlements in other partners to file suit. Moreover, such rights have been exercised in this case. Thus, retroactive validation would void the rights of others, not merely preserve rights.

Appellants place great reliance on rulings of the Tax Court respecting post-filing appointments of TMPs or later ratifications by partners. However, we do not find that the cited Tax Court cases provide appropriate guidance here.

In Computer Programs Lambda, Ltd. v. Comm'r, 90 T.C. 1124 (1988), the Tax Court held that it had inherent power to appoint a limited partner to serve as a TMP, even though such authority is not granted under section 6231(a)(7), since

the partnership had no eligible general partner and the IRS had not selected a TMP under section 6231(a)(7). Id. at 1127.

The facts are not entirely clear from the opinion in Computer Programs respecting how many petitions had been filed. The court mentions its previous opinion in the case in which it found all general partners were ineligible to serve as TMP; the "proper" petition by a notice partner filed on August 11, 1986; and other parties to the litigation under Section 6226(c) whose interests the court wished to protect. Id. at 1125. To facilitate the litigation, the Tax Court appointed a TMP solely for that purpose. The court's validation of the petition at the time of filing by appointment of a TMP was not an issue. Indeed, the court specifically made the date of appointment effective as of February 2, 1988, id. at

1128, clearly not the filing date of the litigation. Thus, this opinion lends no support for appointment of a court-designated TMP, retroactive to the filing date, in order to validate a purported TMP preemptive complaint. The TMP was appointed merely to carry on the litigation , not to instigate it. We agree with the Court of Federal Claims that the court does not have inherent power to appoint anyone as TMP where the cases are not properly before the court because the petitions were not properly filed.

Another case cited as authority for ratification, after the filing of a defective petition, Mishawaka Properties Co. v. Comm'r, 120 T.C. No. 22 (1993), is particularly inapt. In an attempt to avoid a tax assessment,[6] the Mishawaka

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[6] The Mishawaka partners believed the period for assessment had expired unless delayed by a properly filed

partners sought to escape the Tax Court's jurisdiction over a petition filed by the managing partner, whom the IRS dealt with as TMP but who was not the TMP if the partnership were a general rather than a limited partnership. However, the filing partner was held to be the agent of all partners, including the partner who qualified as the TMP (if a general partnership) under Section 6231(a)(7)(B). The Tax Court held that the course of conduct of all partners before and after the filing indicated their approval of the petition at the time it was filed and, thus, the petition filed on their behalf, was held to invoke the court's jurisdiction. Unlike the partners here, the Mishawaka partners unsuccessfully sought to disavow the petition, not retroactively validate it.

Chomp. Assoc. v. Comm'r, 91 T.C. 1069

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petition.

(1988), also cited by appellants, rests on an unremarkable finding of fact that the petition in issue was filed by the TMP partner. Montana Sapphire Associates Ltd. v. Comm'r, 95 T.C. 477 (1970), holds only that the court has discretion to grant leave to amend a technically defective petition where there is evidence that the original signatory was duly authorized to file a petition on behalf of the TMP. Neither supports petitioners here. The record establishes unequivocally that petitioners here were principals signing as the purportedly new TMPs. They did not act or even purport to act of behalf of or as agent or attorney for Adams as TMP.[7] We find no support for appellants' position that one

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[7] We need not analyze the additional jurisdictional requirement that the partner filing a petition in the Court of Federal Claims must pay the amount of the tax deficiency. We do not have enough information respecting Adams' tax liability, if any.

entity may be substituted for another who filed the petition in order to create jurisdiction retroactively. Jurisdiction is never a matter of discretion. As we read its precedent, the Tax Court has held merely that it may, as a matter of discretion, permit amendment of a technically defective TMP petition to allow substitution of the correct party where a petition was signed by essentially an "alter ego" or agent of the TMP.

D. Appellants Have Not Been Denied Due Process

Appellants argue that if section 6231(a)(7) and the Temporary Regulations are applicable during the judicial phase of the TEFRA proceedings, the partners' constitutional rights are impaired, since the IRS, the partnership's adversary, either is allowed to designate its opponent's representative, or is allowed

to leave its opponent without a representative.

The IRS asserts that appellants' due process arguments are meritless since notice partners are permitted to file petitions after the 90 day period and did so in this case. The IRS further points out that a properly appointed TMP may intervene in any such action under section 6226(b)(5). Therefore, appellants and other limited partners will have a full opportunity to litigate the readjustment issue and have not been denied due process.

The due process arguments of appellants highlight the fact that this dispute is about choice of forum. Although appellants prefer to litigate their dispute in a forum other than the Tax Court, appellants have not been denied due process merely because, under the circumstances here, they must proceed

in that forum.

IV.

CONCLUSION

Having duly considered the above and all other of appellants' arguments, we affirm the judgment of the Court of Federal Claims dismissing the petitions for lack of jurisdiction.

AFFIRMED

IN THE UNITED STATES CLAIMS COURT

90-116T, 90-123T, 90-124T, 90-130T, 90 -146T, & 90-153T
(Filed September 25, 1992)

TRANSPAC DRILLING VENTURE, 1983-63, BY CRESTWOOD HOSPITALS, INC.,

Plaintiff,

v. 90-116T

UNITED STATES,

Defendant.

Taxes; jurisdiction; partnership tax; final partnership administrative adjustment; petition for readjustment; tax matters partner.

TRANSPAC DRILLING VENTURE, 1983-1, BY CRESTWOOD HOSPITALS, INC.,

Plaintiff,

v. 90-123T

UNITED STATES,

Defendant.

TRANSPAC DRILLING VENTURE, 1983-2, BY JAMES M. DOBBINS,

Plaintiff,

v. 90-124T

UNITED STATES,

Defendant.

TRANSPAC DRILLING VENTURE,
1983-4, BY BRYAN D. BURR,

Plaintiff,

v. 90-130T

UNITED STATES,

Defendant.

TRANSPAC DRILLING VENTURE,
1983-14, BY ALISTAR CORPORATION,

Plaintiff,

v. 90-146T

UNITED STATES,

Defendant.

TRANSPAC DRILLING VENTURE,
1983-38,BY LINDSEY & HALL, INC.,

Plaintiff,

v. 90-153T

UNITED STATES,

Defendant.

Arthur H. Boelter, Seattle, Washington, for plaintiffs.

William K. Drew, Washington, D.C.,

with whom was *Acting Assistant Attorney General Brian C. Griffin*, for defendant.

OPINION

MARGOLIS, *Judge*.

These tax cases are before the court on defendant's motions to dismiss. Plaintiffs-partnerships filed petitions for readjustment in this court following receipt from the Internal Revenue Service (IRS) of notices of final partnership administrative adjustments (FPAA). Defendant now moves to dismiss, contending that this court lacks subject matter jurisdiction over all the cases.

FACTS

The IRS conducted partnership level examinations of the 1983 and 1984 tax returns of the plaintiffs-partnerships: Transpac Drilling Venture (TDV) 1983-63, TDV 1983-1, TDV 1983-2, TDV 1983-4, TDV

1983-14, and TDV 1983-38. All the plaintiffs-partnerships are limited partnerships organized under the laws of Delaware. Following completion of the examinations, the IRS mailed FPAAs to each partnership's tax matters partner (TMP) of record at that time.[8]

According to TDV 1983-2, TDV 1983-4, TDV 1983-1, and TDV 1983-63, Adams orally resigned as TMP of the partnerships on January 30, 1990, leaving the partnerships without any remaining general partners eligible to assume the position of TMP. TDV 1983-38 asserts that Cofman resigned as its TMP on February 13, 1990, also leaving it without a general partner eligible to be TMP. TDV 1983-14 maintains that its sole

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[8] At the time the IRS mailed the FPAAs, Douglas C. Adams (Adams) was the TMP of record for TDV 1983-63, TDV 1983-1, TDV 1983-2, TDV 1983-4, and TDV 1983-14. Morris Cofman (Cofman) was the TMP for 1983-38.

limited partner at the time, Alistar Corporation (Alistar), removed Adams as its TMP in June 1989, leaving it without a general partner eligible to be TMP.

TDV 1983-2, TDV 1983-4, TDV 1983-1, and TDV 1983-63 further assert that James M. Dobbins (Dobbins), Bryan D. Burr (Burr), and Crestwood Hospitals, Inc. (Crestwood), limited partners of the respective partnerships,[9] were designated general partners for the purpose of serving as TMPs. TDV 1983-38 asserts the same as to Linsdey & Hall, Inc. (Lindsey & Hall). TDV 1983-14 contends only that one Adams was removed as TMP, Alistar, continuing in its capacity as a limited partner, became TDV 1983-14's new TMP.

On February 12, 1990, Adams signed documents entitled "Resignation of Tax Matters Partner and Appointment of New

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[9] Crestwood is a limited partner of both TDV 1983-1 and TDV 1983-63.

Tax Matters Partner," in which, according to plaintiffs-partnerships, Adams memorialized his oral resignation as TMP of TDV 1983-2, TDV 1983-4, TDV 1983-1, and TDV 1983-63 and appointed Dobbins, Burr, and Crestwood as TMPs for the tax years 1983 and 1984. Although not signed by Dobbins, Burr, and Crestwood, the documents also provided that each "accepts his appointment" and "agrees to become a general partner for this limited purpose only." Cofman apparently executed a similar document for TDV 1983-38 on February 14, 1990.

All of the purported TMPs deposited funds with the IRS equalling their estimates of the increase in taxes if the adjustments made in the FPAAs were upheld. All plaintiffs-partnerships then filed timely petitions for readjustment in this court.

DISCUSSION

In its motions to dismiss, defendant contends that this court is without subject matter jurisdiction because Dobbins, Burr, Crestwood, Lindsey & Hall, and Alistar were not the proper parties to file petitions for readjustment during the period of time in which they did. According to the Internal Revenue Code of 1986, 26 U.S.C. § 6226(a) (hereinafter I.R.C.), once an FPAA is mailed to the TMP, the TMP has 90 days within which to file a petition contesting the adjustments. This code section allows only for filing by the TMP during this time period, but I.R.C. § 6226(b) permits others to file a petition within 60 days following the expiration of the original 90 day period if the TMP failed to file a readjustment petition within that time.

I.R.C. § 6231(a)(7)(A) permits a partnership to designate its TMP "as

provided in regulations,"[10] so long as the person or entity chosen is a general partner in the partnership. If the partnership should fail to designate a TMP, then "the general partner having the largest profits interest in the partnership at the close of the taxable year involved" becomes the TMP. I.R.C. § 6231(a)(7)(B). However, the I.R.C. further provides that the Secretary of the Treasury may designate a TMP for a partnership if no general partner has been designated as such, and it would be "impracticable to apply subparagraph (B)." I.R.C. § 6231(a)(7).

As defendant notes, the aforementioned requirements for filing a petition are jurisdictional in nature because the

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[10] Temp. Treas. Reg. § 301.6231(a)(7)-1T(b) provides that a person may be a TMP if that person was a general partner in the partnership at some time during the taxable year or at the time the designation as TMP was made.

failure to comply with them means that the petition for readjustment does not effectively commence suit. *See Computer Programs Lambda, Ltd. v. Comm'r*, 89 T.C. 198, 202 (1987). Because Dobbins, Burr, Crestwood, Lindsey & Hall, and Alistar filed the petitions for readjustment within 90 days of the mailing of the FPAAs, this court must determine if they satisfied the TMP requirements.

I. General partner status

Defendant argues that Dobbins, Burr, Crestwood and Lindsey & Hall were not TMPs at the time of the filing of the petitions because they were not general partners of their partnerships. Plaintiffs respond, stating that the appointment of Dobbins, Burr, Crestwood, and Lindsey & Hall as general partners properly complied with the law governing the partnerships, Delaware law, as well

as with the partnership agreements.

To determine if the aforementioned purported TMPs were in fact general partners for purposes of I.R.C. § 6231(a)(7)(A), this court must turn to the law under which the partnerships were created, Delaware limited partnership law. Del. Code Ann. tit. 6, § 17-403(1974 & Supp. 1988), provides that general partners of limited partnerships have "the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners." In other words, general partners assume unlimited liability for partnership debts. *See Mercier v. Saber, Inc.*, 708 F. Supp. 27, 29 (D.R.I.)(construing the Revised Uniform Limited Partnership Act, which Delaware follows), *aff'd* 888 F.2d 1459 (1st Cir. 1989); *Klein v. Weiss*, 395 A.2d 126, 135 (Md. 1978)(same). In referring

to the resignation and designation documents executed by Adams and Cofman, defendant maintains that Dobbins, Burr, Crestwood, and Lindsey & Hall have not assumed such liability because the documents in question state that the aforementioned partners because general partners for the "limited purpose only" of being TMPs. Defendant concludes that Dobbins, Burr, Crestwood, and Lindsey & Hall remain limited partners only and therefore cannot be TMPs.

Plaintiffs-partnerships do not dispute that Dobbins, Burr, Crestwood, and Lindsey & Hall have not assumed unlimited liability, but assert that "the unlimited liability of a general partner has nothing to do with the reason why the regulation calls for the TMP to be a general partner . . . ." In citing *Chomp Assoc. v. Comm'r*, 91 T.C. 1069 (1988), plaintiffs conclude that a TMP need not

fully comply with the statutory requirements of general partner status because I.R.C. § 6231 was enacted only to provide the IRS with a contact at a partnership possessing authority to act for the partnership on tax matter; according to plaintiffs, Congress did not intend the statute to ensure that the TMP would have third party liability.

Notwithstanding plaintiffs-partnerships' unsupported conclusions about the intent behind the pertinent I.R.C. provisions, this court finds that because Dobbins, Burr, Crestwood, and Lindsey & Hall have not assumed unlimited liability they cannot be considered general partners, and consequently do not meet the definition of a TMP in I.R.C. § 6231 (a)(7)(A).[11] To find otherwise

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[11] Defendant also argues in this regard that Dobbins, Burr, Crestwood, and Lindsey & Hall were not properly admitted to the partnerships in question as general partners because they did not obtain the

would simply to ignore the language of the statute and the plain legal meaning associated with that language. Because Dobbins, Burr, Crestwood, and Lindsey & Hall were not TMPs at the time they filed the petitions for readjustment (which was within the initial 90 day period after the mailing of the FPAAs), I.R.C. § 6226(a) has not been satisfied, and the petitions did not effectively commence suit. *See Computer Programs Lambda, Ltd.*, 89 T.C. at 202.[12]

Regarding TDV 1983-14, Alistar does

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written consents of all the partners and did not file an amendment to the certificates of limited partnership. This court takes no position on this matter because of the ruling, *supra*, that, without assuming unlimited liability, the aforementioned partners could not properly be considered general partners.

[12] In its motion to dismiss, defendant raises several other alleged defects with plaintiffs-partners' petitions that could result in depriving this court of subject matter jurisdiction. However, because of the ruling, *supra*, this court need not reach those issues.

not maintain that it was a general partner either at any time during 1983 or 1984 or at the time the purported designation as TMP was made. Alistar instead argues that Temp. Treas. Reg. § 301.6231(a)-1T(f)(1)[13] authorizes a partnership to appoint a limited partner to serve as TMP and that Alistar was appointed under that regulation. As

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[13] This section reads as follows:

> (1) In general. A tax matters partner may be designated for a partnership taxable year under this paragraph (f) only if, at the time the designation is made, each partner who was a general partner at the close of such partnership taxable year is described in one or more of the following subdivisions of this paragraph (f)(1).
>
> (i) The general partner is dead, or, if the general partner is an entity, has been liquidated or dissolved;
>
> (ii) The general partner has been adjudicated by a court of competent jurisdiction to be no longer capable of managing his or her person or estate;
>
> (iii) The general partner's partnership items have become nonpartnership items under section 6231(b); or
>
> (iv) The general partner is no longer a partner in the partnership.

defendant notes, paragraph (f) must be read in conjunction with paragraph (b), which provides that to be eligible to be a TMP, a person must have been a general partner in the partnership at some time during the tax year in question or must have been a general partner at the time the TMP designation was made. When paragraph (f) is read in light of paragraph (b), this court cannot find that paragraph (b) permits a partnership to name a limited partner as TMP. Paragraph (f) pertains to situations in which no general partners from a tax year in question exist or are eligible to serve as TMP for that tax year. In such circumstances, paragraph (f) allows certain partners to designate a TMP; nevertheless, the designation still must conform with paragraph (b), which in this circumstance means that a person who is a general partner at the time of TMP

designation may properly be designated as such. Because Alistar was at all times a limited partner, paragraph (f) cannot work in its favor.

II. Recognition of Alistar as TMP

Alistar asserts that defendant has recognized it as TDV 1983-14's TMP because defendant addressed an April 6, 1990 FPAA to it in its capacity as TMP. Defendant counters that this FPAA was "merely sent to Alistar as a precautionary measure and did not constitute a designation or recognition of Alistar as the TMP of TDV 1983-14." Defendant explains that the FPAA giving rise to Alistar's February 13, 1990 petition for readjustment was mailed to Adams as TDV 1983-14's TMP on November 17, 1989, with copies sent to Alistar as notice partner on December 5, 1989. As defendant notes, the April 1990 FPAA is

not probative of whether Alistar had been validly appointed as TDV 1983-14's TMP as of February 13, 1990, the date Alistar filed its petition for readjustment in this case. Whether or not defendant recognized Alistar as TMP at some point after Alistar had filed its petition for readjustment, nothing indicates that Alistar was TDV 1983-14's TMP at the time it filed the petition. Consequently, this court lacks jurisdiction over the case because the petition was not filed by the TMP.

III. Inherent power of the court to designate a TMP

All the plaintiffs-partnerships in these cases also argue that this court may use its inherent power to designate Dobbins, Burr, Crestwood, Lindsey & Hall, and Alistar as TMPs. In *Computer Programs Lambda, Ltd. v. Comm'r*, 90 T.C. 1124 (1988), the Tax Court used its

inherent power to appoint a limited partner as TMP in a case that was properly before it because a notice partner had filed a petition in compliance with § 6226(b)(1). Without a TMP, the court ruled, the interests of partners could have been adversely affected in the course of the litigation because there was no assurance that the partners would receive sufficient information concerning the litigation to protect their interests. *Id.* at 1126-27.

Here, the cases are not properly before the court because the petitions were not properly filed. Consequently, this court has no inherent power to appoint anyone as TMP, and no interests will be adversely affected through the course of litigation because this court has no jurisdiction to entertain these cases.

IV. Ratification of the defective petitions

Because of the ruling regarding Dobbins, Burr, Crestwood, Lindsey & Hall, and Alistar, plaintiffs-partnerships would like this court to allow Adams and Cofman to ratify the petitions if they are still eligible to be TMPs. Both USCCR 17(a) and the Tax Court decision in *Montana Sapphire Assoc. v. Comm'r*, 95 T.C. 477 (1990) appear at first glance to support plaintiffs-partnerships' position. However, as defendant points out, I.R.C. § 6226(e)(1) works against plaintiffs-partnerships.

In cases before the Claims Court or district court, § 6226 (e)(1) requires that the partner filing the readjustment petition deposit with the Secretary of the Treasury the increase in the partner's liability which would occur if the partner's return were made consistent

with the FPAA. Such a deposit must be made prior to or on the day of filing the petition. *Id.* The I.R.C. does not impose a deposit requirement on partners filing petitions in Tax Court. Again, applying the plain meaning of the statute, this court finds that ratification is not permissible here because Adams and Cofman cannot satisfy the statutory demand that they make deposits by the time of filing since the petitions have already been filed.

Because a petition filed in Tax Court does not encounter a deposit jurisdictional requirement such as it would in the Claims Court or the district court, Tax Court opinions do not support plaintiffs-partnerships' ratification argument in this court.

CONCLUSION

For the foregoing reasons, defendant's

motions to dismiss are granted. The clerk will dismiss the petitions. No costs.

s/ Lawrence S. Margolis

LAWRENCE S. MARGOLIS

Judge, U.S. Claims Court

September 25, 1992

Statutes and Regulations:

Tax Equity and Fiscal Responsibility Act of 1982:

26 U.S.C. § 6221:

> Except as otherwise provided in this subchapter, the tax treatment of any partnership item shall be determined at the partnership level.
>
> . . . .

26 U.S.C. § 6224:

> (a) PARTICIPATION IN ADMINISTRATIVE PROCEEDINGS.--Any partner has the right to participate in any administrative proceeding relating to the determination of partnership items at the partnership level.
>
> . . . .
>
> (c) SETTLEMENT AGREEMENT.--In the absence of a showing of fraud, malfeasance, or misrepresentation

of fact--

(1) BINDS ALL PARTIES.--A settlement agreement between the Secretary and 1 or more partners in a partnership with respect to the determination of partnership items for any partnership taxable year shall (except as otherwise provided in such agreement) be binding on all parties to such agreement with respect to the determination of partnership items for such partnership year. An indirect partner is bound by any such agreement entered into by the pass-thru partner unless the indirect partner has been identified as provided in section 6223(c)(3).

(2) OTHER PARTNERS HAVE RIGHT TO ENTER INTO CONSISTENT

AGREEMENTS.--If the Secretary enters into a settlement agreement with any partner with respect to partnership items for any partnership taxable year, the Secretary shall offer to any other partner who so requests settlement terms for the partnership taxable year which are consistent with those contained in such settlement agreement. Except in the case of an election under paragraph (2) or (3) of section 6223(e) to have a settlement agreement described in this paragraph apply, this paragraph shall apply with respect to a settlement agreement entered into with a partner before notice of a final partnership administrative adjustment is

mailed to the tax matters partner only if such other partner makes the request before the expiration of 150 days after the day on which such notice is mailed to the tax matters partner.

(3) TAX MATTERS PARTNER MAY BIND CERTAIN OTHER PARTNERS.--

(A) IN GENERAL.--A partner who is not a notice partner (and not a member of a notice groups described in subsection (B)(2) of section 6223) shall be bound by any settlement agreement--

(i) which is entered into by the tax matters partner, and

(ii) in which the tax matters partners expressly states that such agreement shall

bind their other partners.

(B) EXCEPTION.--Subparagraph (A) shall not apply to any partner who (within the time prescribed by the Secretary) files a statement with the Secretary providing that the tax matters partner shall not have the authority to enter into a settlement agreement on behalf of such partner.

. . . .

26 U.S.C. § 6226:

(a) PETITION BY TAX MATTERS PARTNER- Within 90 days after the day on which a notice of final partnership administrative adjustment is mailed to the tax matters partner, the tax matters partner may file a petition for a readjustment of the partnership items for such taxable

year with--

(1) the Tax Court,

(2) the district court of the United States for the district in which the partnership's principal place of business is located, or

(3) the Claims Court.

(b) PETITION BY PARTNERS OTHER THAN TAX MATTERS PARTNER.--

(1) IN GENERAL--If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, any notice partner (and any 5-percent group) may, within 60 days after the close of the 90-day period set forth in subsection (a), may file a petition for a readjustment of the partnership items for the

taxable year involved with any of the courts described in subsection (a).

(2) PRIORITY OF THE TAX COURT ACTION.--If more than 1 action is brought under paragraph (1) with respect to any partnership taxable year, the first such action brought in the Tax Court shall go forward.

(3) PRIORITY OUTSIDE THE TAX COURT. --If more than 1 action is brought under paragraph (1) with respect to any partnership for any taxable year but no such action is brought in the Tax Court, the first such action brought shall go forward.

(4) DISMISSAL OF OTHER ACTIONS.--If an action is brought under paragraph (1) in addition to the action which goes forward under

paragraph (2) or (3), such action shall be dismissed.

(5) TAX MATTERS PARTNER MAY INTERVENE.--The tax matters partner may intervene in any action brought under this subsection.

. . . .

(e) JURISDICTIONAL REQUIREMENT FOR BRINGING ACTION IN DISTRICT COURT OR CLAIMS COURT.--

(1) IN GENERAL.--A readjustment petition under this section may be filed in a district court of the United States or the Claims Court only if the partner filing the petition deposits with the Secretary, on or before the day the petition is filed, the amount by which the tax liability of the partner would be increased if the treatment of partnership items on

the partner's return were mad consistent with the treatment of the partnership items on the partnership return, as adjusted by the final partnership administrative adjustment. In the case of a petition filed by a 5-percent group, the requirement of the preceding sentence shall apply to each member of the group. The court may by order provide that the jurisdictional requirement of this paragraph are satisfied where there has been a good faith attempt to satisfy such requirements and any shortfall in the amount required to be deposited is timely corrected.

(2)REFUND ON REQUEST.--If any action brought in a district court of the United states or in the Claims Court is dismissed by reason of the priority of a Tax Court

action under paragraph (2) of subsection (b), the Secretary shall, at the request of the partner who made the deposit, refund the amount deposited under paragraph (1).

(3) INTEREST PAYABLE.--Any amount deposited under paragraph (1), while deposited, shall not be treated as a payment of tax for purposes of this title (other than chapter 67).

. . . .

26 U.S.C. § 6231

(a) Definition.--For purposes of this subchapter--

(1) Partnership.--

(A) In general.--Except as provided in subparagraph (b), the term "partnership" means any partnership

required to file a return under section 6031(a).

(B) Exception for small partnerships.--

(i) In general.--The term "partnership" shall not include any partnership if--

(I) such a partnership has 10 or fewer partners each of whom is a natural person (other than a nonresident alien) or an estate, and

(II) each partner's share of each partnership item is the same as his share of every other item.

For purposes of the preceding sentence, a husband and wife (and their estates) shall be

treated as 1 partner.

(ii) Election to have subchapter apply.--A partnership (within the meaning of subparagraph (A) may for any taxable year elect to have clause (i) not apply. Such election shall apply for such taxable year and all subsequent taxable years unless revoked with the consent of the Secretary.

. . . .

(3) **Partnership item.**--The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the

Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

(4) **Nonpartnership item.**--The term "nonpartnership item" means an item which is (or is treated as) not a partnership item.

. . . .

(7) **Tax matters partner.**--The tax matters partner of any partnership is--

(A) the general partner designated as the tax matters partner as provided in regulations, or

(B) if there is no general partner who has been so designated, the general partner having the largest profits interest in the

partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 of such partners whose name would appear first in an alphabetical listing).

If there is no general partner designated under subparagraph (A) and the Secretary determines that it is impractical to apply subparagraph (B), the partner selected by the Secretary shall be treated as the tax matters partner.

. . . .

(c) Regulations With Respect to Certain Special Enforcement Areas.--

(1) Applicability of subsection.-

-This subsection applies in the case of

(A) assessments under section

6851 (relating to termination assessments of income tax) or section 6861 (relating to jeopardy assessments of income, estate, gift, and certain excise taxes),

(B) criminal investigations,

(C) indirect methods of proof of income,

(D) foreign partnerships, and

(E) other areas that the Secretary determines by regulation to present special enforcement considerations.

(2) **Items may be treated as nonpartnership items.**--To the extent that the Secretary determines and provides by regulations that to treat items as partnership items will interfere with the effective and efficient enforcement of this

title in any case described in paragraph (1), such items shall be treated as nonpartnership items for purposes of this subchapter.

(3) **Special rules.**--The Secretary may prescribe by regulation such special rules as the Secretary determines to be necessary to achieve the purposes of this subchapter in any case described in paragraph (1).

. . . .

Temp. Reg. §301.6224(a)-1T:

Every partner in the partnership, including an indirect partner, has the right to participate in any phase of administrative proceedings. However, except as provided in section 6223 and the regulations thereunder, neither the

Service nor the tax matters partner is required to provide notice of any proceeding to partners. Consequently, a partner who wishes, for example, to be present during a preliminary discussion between an examining agent and the tax matters partner should make special arrangements with the tax matters partner to obtain information as to the time and place of the discussion. The Service and the tax matters partner will determine the time and place for all administrative proceedings. Arrangements will generally not be changed merely for the convenience of another partner.

Temp. Reg. §301.6231(a)(7)-1T:

(a) In general. A partnership may designate a partner as its tax

matters partner for a specific taxable year only as provided in this section. Similarly, the designation of a partner as the tax matters partner for a specific taxable year may be terminated only as provided in this section.

(b) Persons who may be designated tax matters partner--

(1) General requirement. A person may be designated as the tax matters partner of a partnership for a taxable year only if that person

(i) Was a general partner in the partnership at some time during the taxable year for which the designation is made, or

(ii) Is a general partner in the partnership as of the time the designation is made.

. . . .

(f) Designation by partners with majority interest under certain circumstances--

(1) In general. A tax matters partner may be designated for a partnership taxable year under this paragraph (f) only if, at the time the designation is made, each partner who was a general partner at the close of such partnership taxable year is described in one or more of the following subdivisions of this paragraph (f)(1).

(i) The general partner is dead, or, if the general partner is a entity, has been liquidated, or dissolved;

(ii) The general partner has been adjudicated by a court of competent jurisdiction to be

no longer capable of managing his or her person or estate;

(iii) The general partner's partnership items have become nonpartnership items under section 6231(b); or

(iv) The general partner is no longer a partner in the partnership.

. . . .

(k) When designation, etc., becomes effective--

(1) In general. Except as otherwise provided in paragraph (k)(2) of this section, a designation, resignation, or revocation provided for in this section becomes effective on the day that the statement required by the applicable paragraph of this section is filed.

(2) Notice of proceeding mailed. If

a notice of beginning of an administrative proceeding with respect to a partnership taxable year is mailed before the date on which a statement of designation, resignation, or revocation provided for in this section with respect to that taxable year is filed, the Service is not required to give effect to such designation, resignation, or revocation until 30 days after the statement is filed.

(1) **Termination of designation.** A designation of a tax matters partner for a taxable year under this section shall remain in effect until--

(1) The death of the designated tax matters partner,

(2) An adjudication by a court of

competent jurisdiction that the individual designated as the tax matters partner is no longer capable of managing the individual's person or estate,

(3) The liquidation or dissolution of the tax matters partner, if the tax matters partner is an entity,

(4) The partnership items of the tax matters partner become nonpartnership items under section 6231(c)(relating to special enforcement areas), or

(5) The day on which--

(i) The resignation of the tax matters partner under paragraph (i) of this section,

(ii) A subsequent designation under paragraph (d),(e), or (f) of this section, or

(iii) A revocation of the designation under paragraph (j) of this section becomes effective.

The termination of the designation of a partner as the tax matters partner under this paragraph (1) does not affect the validity of any action taken by that partner as tax matters partner before the designation is terminated. For example, if that tax matters partner had previously consented to an extension of the period for assessments under section 6229(b)(1)(B), that the extension remains valid even after termination of the designation.

(m) Tax matters partner where no partnership designation made--

(1) In general. The tax matters partner for a partnership taxable

year shall be determined under this paragraph (m) if:

(i) The partnership has not designated a tax matters partner under this section for that taxable year; or

(ii) The partnership has designated a tax matters partner under this section for that taxable year, that designation has been terminated under paragraph (l) of this section, and the partnership has no made a subsequent designation under this section for that taxable year.

(2) **General partner having the largest profits interest is the tax matters partner.** The tax matters partner for any partnership taxable year to

which this paragraph (m) applies is the general partner having the largest profits interest in the partnership at the close of that taxable year (or where there is more than one such partner, the one of such partners whose name would appear first in an alphabetical listing).

For purposes of this paragraph (m)(2), all limited partnership interests held by a general partner shall be included in determining that general partner's profits interest in the partnership.

. . . .